Journal of Air Law and Commerce

Volume 37 | Issue 1 Article 6

1971

Unfair Representation and the National Labor Relations Board: A Functional Analysis

Dennis R. Lewis

Comment

UNFAIR REPRESENTATION AND THE NATIONAL LABOR RELATIONS BOARD: A FUNCTIONAL ANALYSIS

DENNIS R. LEWIS

I. THE DUTY OF FAIR REPRESENTATION

Labor unions have historically been treated as voluntary associations. The right of a member to participate in the internal functioning of a union was governed chiefly by the constitution and by-laws of the union. If the judiciary chanced to intervene in the internal organization of a union, the intervention was limited to a scrutiny of the implied contract existing between member and union to determine if that contract had been violated,[1] or to protect the property rights that had arisen out of payment of union dues.[2] Recently, legislation that has defined the place of the labor organization in the national labor policy, expressly recognizing the rights and duties of labor unions, has made the voluntary association theory anachronistic. The employer, the union member, and the employee who works under a collective bargaining contract and chooses not to join the union are directly affected by statutory regulation of the union. The purpose of this Comment is to explore the duties imposed upon labor organizations arising out of the statutory recognition of the union as a bargaining agent, the determination of the proper jurisdiction and the method of achieving an adequate remedy.

A. *Historical Development of Fair Representation*

Unions representing railway employees are governed by the Railway Labor Act of 1926,[3] providing that railway employees shall have the right to organize for collective bargaining purposes and to choose agents to represent them in the bargaining process.[4] The Act also provides that the labor organization chosen by the majority vote of the employees in a specified unit shall be the exclusive agent for all employees within that unit.[5] *Steele v. Louisville & Nashville R.R.*[6] was

[1] *See* Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931).

[2] *See* Heasley v. Operative Plasterers & Cement Finishers Int'l Ass'n, 324 Pa. 257, 188 A. 206 (1936).

[3] 45 U.S.C. §§ 151-88 (1964).

[4] Railway Labor Act § 2(4), 45 U.S.C. § 152(4) (1964).

[5] *Id.*

[6] 323 U.S. 192 (1944).

the basis for recognizing that the statutory authority given to the union carried a corresponding duty to represent each employee in the unit on a non-discriminatory basis. In *Steele* a Negro locomotive fireman for the Louisville & Nashville Railroad was excluded from membership in the union because of his race. The railway brotherhood attempted to negotiate a contract with the carrier that would have eliminated all Negroes as firemen. Steele complained of the union's failure to represent him and the other Negro firemen on a non-discriminatory basis in contract negotiations. The Supreme Court recognized that while a union is essentially a private organization, "its power to represent and bind all members of a unit is derived solely from Congress."[7] The Court concluded that commensurate with the power conferred upon the union by Congress as the exclusive bargaining agent of all members of the unit came the duty to represent the interests of all the employees within the unit "fairly, impartially, and in good faith."[8]

On the same day that the Court decided *Steele*, it had the opportunity to decide a similar case arising under the National Labor Relations Act.[9] Like the Railway Labor Act, this act, covering most workers involved in interstate commerce, provides for exclusive representation by the labor organization chosen by the majority vote of the membership of a particular bargaining unit.[10] Further, the union is the *only* authorized representative of all the members in the unit for the purpose of bargaining about wages, hours, and other terms and conditions of employment.[11] This concept of exclusive representation applies without regard to whether an employee voted in favor of the union or chose to become a member of it. In *Wallace Corp. v. Board*[12] the incumbent union, openly friendly with the company, induced the employer to fire certain employees who favored the establishment of another union. The Court found the actions on the part of the incumbent union to be a violation of the duty of fair representation.[13] As the "agent of all the employees, charged with the responsibility of representing their interests fairly and impartially"[14] the union had not acted in a manner consistent with the duties of the exclusive bargaining agent by treating members of the unit differently and unequally.

Nine years elapsed before the Court began to enunciate clearly the

---

[7] *Id.* at 200.

[8] *Id.*

[9] 29 U.S.C. §§ 151-68 (1964).

[10] National Labor Relations Act (Wagner Act) § 9(a), 29 U.S.C. § 159(a) (1964).

[11] National Labor Relations Act (Wagner Act) § 8(b), 29 U.S.C. § 158(d) (1964) (emphasis added).

[12] 323 U.S. 248 (1944).

[13] *Id.* at 256.

[14] *Id.* at 255, 256.

duties of the union under the National Labor Relations Act. In *Ford Motor Co. v. Huffman*,[15] the Court realized that invariably differences would arise between the union as the bargaining agent and individual employees as to the desirability of certain contract provisions. The union was to be allowed a wide range of reasonable alternatives, "subject always to complete good faith and honesty"[16] in bargaining for terms that might adversely affect particular individuals within the unit. In *Syres v. Oil Workers Int'l*,[17] a case similar to *Steele*, discrimination against a Negro employee was alleged. The Court made it clear that the duty of fair representation enunciated in *Steele* applied equally to similar cases under the National Labor Relations Act. In a brief *per curiam* order citing *Steele* the Supreme Court allowed an injunction and damages against the union because of racial discrimination.[18]

B. *Delineating the Duty*

The duty to represent all employees fairly arose out of violations that affected the rights of individual employees. As early as 1944, the Supreme Court noted that in addition to the interest of employees, a public interest must be protected.[19] The public interest arose out of the investiture of statutory authority upon unions with regard to all bargaining functions arising out of a collective bargaining context. This public interest could not be assuaged by merely refraining from active discrimination against certain employees.[20] In *Conley v. Gibson*[21] the union neglected to object to the seniority reductions of its Negro members. The Court found that even when the union has met its duty of fair representation in the creation of the collective bargaining contract, the contract may not be "administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."[22]

The Supreme Court recognized the duty of a union to represent all employees fairly and impartially, but pointedly refused to define the parameters of the duty. However, *Steele* indicated that the duty of fair representation did not extend to the making of a contract "which may have unfavorable effects on some of the members of the craft represented."[23] *Huffman* also indicated that a "wide range of reasonableness must

---

[15] 345 U.S. 330 (1953).

[16] *Id.* at 338.

[17] 350 U.S. 892 (1955).

[18] *Id.*

[19] *See* J. I. Case Co. v. NLRB, 321 U.S. 335 (1944).

[20] *Id.* at 337.

[21] 355 U.S. 41 (1957).

[22] *Id.* at 46.

[23] 323 U.S. at 198.

be allowed a statutory bargaining representative in serving the unit it represents . . . ."[24]

In *Vaca v. Sipes*[25] Owens was denied reinstatement because the company believed that his blood pressure was too high to permit him to handle his heavy work. A union physician examined Owens and concurred that he would be unable to perform the work. The union therefore discontinued the grievance procedure on Owens' behalf, which had already proceeded through several stages. Owens charged the union with "arbitrarily and capriciously" failing to process the case through arbitration. This situation presented the Supreme Court with the opportunity to further delineate the substantive duties of the union arising out of fair representation. The Court defined the duty of fair representation, a federal question,[26] in terms of "good faith," concluding that a union must in "good faith and in a nonarbitrary manner, make decisions as to the merits of a particular grievance."[27] But good faith does not mean that the union must be correct in anticipating the outcome of the grievance when the case is ultimately taken to arbitration or the courts. The theory that each employee has an "absolute right"[28] to have his grievance taken to arbitration was rejected, although the Court agreed that a union could not "arbitrarily ignore a meritorious grievance or process it in a perfunctory manner . . . ."[29] The Court noted that a stable labor policy contemplated a good faith attempt by labor and management to settle contract disputes without resorting to arbitration, especially if frivolous grievances are involved.[30] A requirement that the union be able to predict with absolute accuracy the outcome of the arbitration process would perforce cause the union to process many frivolous and insubstantial grievances. The Court concluded that "[s]ince the union's statutory duty of fair representation protects the individual employee from arbitrary abuses . . . this severe limitation on the power to settle grievances is neither necessary nor desirable . . . ."[31] Thus, the union had not violated its duty of fair representation because the record indicated an affirmative showing of good faith and a corresponding lack of invidious and irrelevant discrimination in the handling of the grievance.[32]

[24] 345 U.S. at 338.

[25] 386 U.S. 171 (1967).

[26] *Id.* at 173. The Court noted that "although we conclude that state courts have jurisdiction in this type of case, we hold that federal law governs . . . ."

[27] *Id.* at 191.

[28] *Id.* at 192.

[29] *Id.*

[30] *See* Labor Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1964) (preamble): "Final adjustment by a method agreed upon by the parties . . . is . . . the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

[31] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[32] *Id.* at 195.

C. *A Special Duty: The Civil Rights Act of 1964*

The duty of fair representation arose out of statutory construction of the Railway Labor Act and the National Labor Relations Act, since the Court could only assume that Congress had not imbued a union with the power to be the exclusive bargaining agent of all employees within a unit without imposing a corresponding duty of fair representation.

Title VII of the Civil Rights Act of 1964,[33] while not replacing the concept of fair representation, creates a statutory cause of action that in many ways overlaps the common law duty of fair representation. The 1964 Act makes it unlawful for a labor union to discriminate against an employee by either excluding him from union membership or expelling him on the basis of race, color, religion, sex or national origin.[34] However, the enforcement of Title VII, vested in the Equal Employment Opportunity Commission,[35] appears to create an overlap in jurisdiction between the federal judiciary enforcing the duty of "fair representation," and the EEOC preventing unlawful discrimination on the part of a union against minority or ethnic groups. In *Local 12, United Rubber Workers v. NLRB*,[36] the Court found that the union had not met its duty of fair representation when it had arbitrarily failed to process a Negro union member's claim for back pay. However, the Court went on to point out that the Negro member "would be at liberty to seek redress under the enforcement provision of Title VII . . . ."[37]

II. Enforcement of the Duty of Fair Representation: The Courts, the NLRB, or both?

Beginning with *Steele*, the Supreme Court made it clear that the federal judiciary would be an appropiate place to seek a remedy for a union's violation of fair representation.[38] Because the federal judiciary alone has the duty of enforcing the provisions of the Railway Labor Act,[39]

[33] 42 U.S.C. §§ 1971, 2003-15 (1964).

[34] Civil Rights Act of 1964 § 703(c), 42 U.S.C. § 2003-3(c) (1964). The Act provides that it is unlawful for a labor organization to:

> (1) exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual . . . .

[35] Civil Rights Act of 1964 § 705, 42 U.S.C. § 2000e-3-5 (1964).

[36] 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[37] *Id.* at 17.

[38] 323 U.S. 192; *see supra* note 8.

[39] The Act sets up administrative agencies, the National Railroad Adjustment Board

there is no overlapping of jurisdiction as in National Labor Relations Act cases where both the judiciary and administrative bodies have enforcement jurisdiction within certain areas.

The Court in *Sipes* noted that state courts, applying federal law,[40] could have jurisdiction over unfair representation cases arising under the National Labor Relations Act. Furthermore, the Office of Economic Opportunity has jurisdiction to ensure that unions do not discriminate against employees when the discrimination arises out of racial or ethnic classifications.[41]

Nevertheless, in cases arising under the National Labor Relations Act involving unfair representation, a question exists concerning jurisdiction to effectuate a remedy. *Steele, Wallace, Huffman* and *Syres* made it clear that while the duty of fair representation arose because the unions were endowed with Congressional sanction as the exclusive bargaining agent of all employees, the federal judiciary was empowered to enforce the duty. But the National Labor Relations Act provides for administrative enforcement of certain provisions of the Act by the National Labor Relations Board.[42] The Board's jurisdiction is limited, however, to the enforcement of specified violations of the Act on the part of either the employer or a union, referred to as "unfair labor practices."[43] Thus, if the violation of the duty of fair representation is within the Board's unfair labor practice jurisdiction, both the Board and the judiciary may be enforcement agencies. It is especially important to determine if the Board has jurisdiction to prevent unfair representation on the part of the unions; in the scheme of the National Labor Relations Act the Board exerts great influence upon the formulation and effectuation of the national labor policy.

A. *"Unfair Representation" as an Unfair Labor Practice*

Eighteen years and two major federal labor acts elapsed after *Steele* recognized the existence of the duty of fair representation and before the National Labor Relations Board undertook the enforcement of the duty. In *Miranda Fuel Co.*[44] union member Lopuch received his employer's permission to spend the summer away from the job, permitted by the contract because summer was the "slack season." Lopuch left prior to April 15, and returned after October 15, the period defined in the con-

(section 3), the National Mediation Board (section 4), and airline boards of adjustment (section 204). A federal district court has the power to enforce the awards of these agencies, or to issue injunctions protecting their jurisdiction; however, since the boards do not have contempt powers, enforcement must be through the judiciary.

[40] 386 U.S. at 173; *see supra* note 26.

[41] *See supra* notes 34, 35.

[42] National Labor Relations Act (Wagner Act) § 3, 29 U.S.C. § 153 (1964).

[43] National Labor Relations Act (Wagner Act) § 8, 29 U.S.C. § 158 (1964).

[44] 140 N.L.R.B. 181 (1962).

tract as the "slack season." The late return was excused because of illness. At the urging of some of the members who resented the untimely leaving and return to work, the union demanded that the company reduce Lopuch to the bottom of the seniority list, and the company acquiesced to this demand. Lopuch complained to the National Labor Relations Board that the union had violated its duty of fair representation toward him in the handling of his case. The Board established jurisdiction, holding this to be a case falling within the list of unfair labor practices it was empowered to prevent, thereafter finding both the company and the union in violation of unfair labor practices.[45] The Board found the union in violation of sections 8(b)(1)A and 8(b)(2) of the National Labor Relations Act, relating to a violation arising out of interference by the union with the right of the individual employee to exercise (or refrain from exercising) the right to organize and bargain collectively through a union.[46] The Board appealed to the Second Circuit for enforcement of its order reinstating Lopuch to his old seniority.[47] The court, faced with the narrow question whether Congress had intended unfair representation jurisdiction to be vested in the Board, denied enforcement of the order, concluding that no jurisdiction existed.[48] Mirroring the dissenting opinion of one of the Board members, the court concluded that the evil envisioned by Congress in enacting sections 8(b)(1)A and 8(b)(2) was discrimination arising out of "union membership or other union-connected activities,"[49] not union discrimination unrelated to activities where employees rights to organize were involved. The court

[45] *Id.*

[46] The following sections of the Act, § 8(b)(1)A, 29 U.S.C. § 158(b)(1)A (1964); § 8(b)(2), 29 U.S.C. § 158(b)(2) (1964); § 8(b)(3), 29 U.S.C. § 158(b)(3) (1964) are the statutory bases upon which arguments granting "unfair representation" jurisdiction to the Board rest:

Section 8(b)(1)A. "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (a) employees in the exercise of rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Section 8(b)(2). "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated . . . ."

Section 8(b)(3). "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . ."

Section 7, 29 U.S.C. § 157 (1965), referred to in section 8(b)(1)A, reads as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from . . . such activities . . . ."

[47] NLRB v. Miranada Fuel Co., Inc., 326 F.2d 172 (2d Cir. 1963).

[48] *Id.* at 183.

[49] *Id.*

noted that the briefs of the Board, as well as the amici curiae briefs of the NAACP and the American Civil Liberties Union, assumed the desirability of bringing such controversies before the Board, rather than before the judiciary.[50] Judge Medina refused to accept this public policy argument; instead he relied upon statutory construction to determine whether Congress had intended that unfair representation be within the jurisdiction of the Board's handling of unfair labor practices.[51] Finally, the court held that Congress had not intended the Board to be imbued with powers over unfair representation cases. However, Judge Lumbard dissented on the ground that Congress must have intended that unfair representation cases be an unfair labor practice because it had not specifically made the violation of the Act contingent on discrimination "in regard to . . . employment because of membership in any labor organization."[52]

B. *A Look at the Legislative History of the Taft-Hartley Act*

As the Second Circuit noted in *Miranda*, the "legislative history . . . is not particularly illuminating . . . ."[53] Nevertheless, if any sort of authoritative determination of whether Congress intended unfair representation cases to be within the Board's unfair labor practice jurisdiction can be made, there would appear to be no other source than the legislative history. Fortunately, it is not totally devoid of any indication whether Congress intended fair representation cases to be within the Board's unfair labor practice jurisdiction. *Steele* was not alluded to even once in the congressional records relative to the Act, but this lack of reference could be construed to mean either Congress did not intend to bring fair representation questions before the Boaard, or it was so obviously within the Board's purview that Congress felt no need to refer to *Steele*. The latter alternative appears less sound, because the records nowhere indicate that Congress ever considered the possibility that sections 8(b)(1)A, 8(b)(2) or 8(b)(3) would ever be used as jurisdictional prerequisites to handle fair representation cases.

1. *Section 8(b)(1) A*

The history of section 8(b)(1)A, while not totally dispositive of the issue, is nevertheless quite enlightening. Section 8(b)(1)A makes it an

[50] *Id.* at 176.

[51] *Id.*: " . . . in any event, such matters of policy must be settled and determined by the Congress. In this case our task is not to fix policy but to interpret the statute and say what we think the Congress intended it to mean . . . ."

[52] *Id.* at 182. While concurring with the finding that no unfair labor practice had taken place, Judge Lumbard felt that an unfair representation case could give rise to an unfair labor practice if there was sufficient evidence of "restraint or coercion on the part of the union," even if such restraint did not involve union related activities. *Id.* at 185.

[53] *Id.* at 176.

unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."[54] Section 7 rights encompass the right to self-organize and engage in concerted activities or to refrain from engaging in such activities.[55] The Fifth Circuit in *Local 12, United Rubber Workers v. NLRB*[56] was "convinced that the duty of fair representation implicit in the exclusive representation requirement . . . of the Act comprises an indispensable element"[57] of those rights guaranteed in section 7, thus bringing violations within the purview of section 8(b)(1)A. Since, of course, the employee has no choice but to accept the majority union as the sole and exclusive representative to the employer in regard to wages, hours, and other terms and conditions of employment, the union's half-hearted, nugatory or even actively hostile attitude toward an individual employee seems to have had a coercive effect upon the employee in his right to choose freely to engage in concerted activity or refrain from doing so. The Fifth Circuit has tried to incorporate the concept of exclusive representation, set out in section 9, into the specifically enumerated rights protected in section 7, thus creating a new and greater right.

The concept of a relationship between sections 7 and 9 arises when it is understood that section 7 rights in regard to engaging or failing to engage in collective activities are not absolute.[58] These rights are necessarily limited because the employee has no choice but to be represented by the majority union, if one has been duly chosen. Thus, due to the limitation inherent in the right to refuse to engage in concerted activities, and because the union must be the sole agent with whom the employer bargains, the union has a special duty to avoid coercing and restraining employees in regard to their refraining from engaging in concerted activities. An employee covered by a collective bargaining contract *is* affected by the concerted activities carried on by the union, like it or not. No great "violence is done to the structure . . . of the statute if the duty of fair representation is included among the elements of section 9, and read into section 7."[59] This approach would remove the limitation that a section 8(b)(1)A unfair practice is limited only to union-employee relationships arising out of the desire of an employee not to join the union. Thus, section 8(b)(1)A jurisdiction would be extended to encompass *any* coercion wrought upon the employee because of the exclusivity of the union as the bargaining agent of all employees. It is not clear, how-

[54] *See supra* note 46.

[55] *Id.*

[56] 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[57] *Id.* at 17.

[58] *See* Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16TH ANN. CONF. ON LAB. 3 (1963).

[59] *Id.* at 7.

ever, if this result was intended by Congress in enacting section 8(b)(1)A. In explaining his bill to the House, Representative Hartley explicitly stated that the proposed legislation "guarantees to the employee the right to require the union . . . to represent him without discrimination against him *in any way or for any reason* . . . ."[60] This statement would seem to vindicate the theory that section 8(b)(1)A violations could include those arising out of non-union activities, especially if Congressman Hartley had said nothing further on the subject. However, he explained in the same speech that "any reason" included coercive activities "even [though] he is not a member of the union."[61] He did not elucidate if "any reason" merely included union membership as an example of a discriminatory situation or if it were the *extreme* example of coercive discrimination sought to be avoided by the Act. Later in the same speech, his apparently forthright assertion that the employee was protected from any form of union discrimination was further emasculated when he pointed out the purpose of the bill was a "two way proposition . . . to make the relationship between labor and management equitable . . . ."[62] It would therefore appear that although Congressman Hartley specifically said that the employee would be protected by his bill from "any discrimination" by the union, he did not intend to address himself directly to the type of discrimination that would arise if the employee refused to join the union.

Even if it could be concluded that section 8(b)(1)A includes restraint or coercion involving activities not related to the employees refusal to join the union (clearly an unfair practice),[63] the question must be resolved whether unfair representation itself is the type of coercion or restraint that the Act sought to eliminate from the collective bargaining process. Representative Halleck of Indiana noted that the Act laid down rules that unions must follow in dealing with the employees within the unit. Unions could not restrain or coerce workers, although "unions can organize workers in the usual ways . . . ."[64] Halleck did not specify if he felt that restraint and coercion were limited to violent acts or if they were merely a type of activity not allowed by the Act. In analyzing the compromise bill, Senator Murray was unable to determine if section 8(b)(1)A was limited to "violence and physical coercion,"[65] but he felt

---

[60] 93 CONG. REC. 3425 (1947) (emphasis added).

[61] *Id.*

[62] *Id.*

[63] *See supra* note 46. Section 7, 29 U.S.C. § 157 (1965), includes "the right to . . . form, join, or assist labor organizations . . . and . . . also . . . the right to refrain from . . . activities . . . ." It is to the protection of these rights that section 8(a)(1)A is specifically directed.

[64] 93 CONG. REC. A3347 (1947).

[65] 93 CONG. REC. 6502 (1947).

that if that were the intent of the section it was "unnecessary because offenses of this type are punishable under the state . . . laws . . . . Furthermore the amendment is impractical because an effective remedy . . . is quick arrest . . . and conviction."[66]

Section 8(a)(1) imposes a restraint upon the employer from interfering with the section 7 rights of the employee by making it an unfair labor practice to "interfere, restrain, or coerce"[67] employees in the exercise of their rights to act in concert. On the other hand, section 8(b)(1) limits the union's activities to those that do not "restrain or coerce."[68] As the bill originally came before the Senate it had included the words "interfere with" as a prohibited union activity.[69] Senator Ives, a member of the conference committee that eventually shaped the bill passed by Congress, objected to including the words "interfere with" because they could "easily be construed to mean *any* conversation, . . . any persuasion, any urging . . . [thus constituting] an unfair labor practice."[70] Although the words "interfere with" were dropped from the bill, Senator Taft felt that their inclusion would not have extended the scope of unfair practices.[71] His staff attorneys predicted that the words were superfluous, and their inclusion or exclusion would have no effect upon the matter since the Board had never found a violation under section 8(a)(1) based on interference alone, unless the elements of coercion or restraint were also present.[72] In reporting back to the House on the conference bill, Representative Hartley explained that "interference" had been deleted, "presumably because of the concern that the words 'interfere with' "[73] would extend the scope of the unfair labor practice beyond those activities that Congress did not intend to prohibit. Hartley noted that the elimination of "interfere with" was not intended to "broaden the scope of section 8(a)(1) as heretofore affixed by the long continued practice of the Board."[74] Thus, whatever activities Congress intended to prohibit, whether they are of a violent or physical nature or of a more subtle nature, Congress appeared to intend that section 8(a)(1) and section 8(b)(1) cover the same area exactly, *i.e.*, those acts that the Board

---

[66] *Id.*

[67] National Labor Relations Act (Wagner Act) § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).

[68] National Labor Relations Act (Wagner Act) § 8(b)(1), 29 U.S.C. § 158(b)(1) (1964).

[69] 93 CONG. REC. 4270 (1947).

[70] *Id.*

[71] 93 CONG. REC. 4271 (1947).

[72] *Id.*

[73] 93 CONG. REC. 6373 (1947).

[74] *Id.*

would have considered to be coercive or restraining, and not merely interfering, under section 8(a)(1).[75]

Congress appeared to envision coercion and restraint as being more ubiquitous than acts of violence or physical restraint or coercion. Senator Taft prepared a series of rhetorical questions and answers in which he indicated that even more subtle activities of the union could be unfair labor practices:

> Q: Does the new act give an employee any additional rights?
> A: Yes. He is protected from coercion by labor unions . . . .
> Q: Against what type of coercive conduct by the unions is an employee protected?
> A: He is protected against both physical *and* economic coercion. For example . . . by threatening him with loss of his job, this would be economic coercion.[76]

Thus, it seems that section 8(b)(1) envisioned the same type of activities that are prohibited under section 8(a)(1) by an employer in dealings with his employee; these activities are not necessarily limited to coercive acts of a violent or physical nature.

2. *Section 8(b)(2)*

Section 8(b)(2) becomes operative when the union causes the employer to discriminate against an employee, resulting in discouragement or encouragement of union membership.[77] The original thesis of *Miranda* was that a union encouraging an employer to discipline an employee would also encourage union membership, having engendered a fear on behalf of those who were not in good standing with the union.[78] Clearly, section 8(b)(2) is violated when the union causes an employer to discriminate against an employee solely on the basis of the employee's failure to join the union.[79] Representative Hartley explained that section 8(b)(2) would "prohibit an employer from discriminating against an employee by reason of his membership or non-membership in a labor organization."[80] Hartley gave examples of the type of prohibited activity as situations where a union compelled an employer to hire only union

---

[75] *See infra* note 94. As late as 1960 the general counsel for the Board had determined that the absense of actual violence or threats of violence on the part of the union would be insufficient to constitute a violation of section 8(b)(1)A. Administrative Decision of the General Counsel, 1960 C.C.H. N.L.R.B. ¶ 9088.

[76] 93 CONG. REC. A3369 (1947).

[77] *See supra* note 46.

[78] *See supra* note 45.

[79] Section 8(b)(2) specifically makes it a violation for a "labor union . . . to cause or attempt to cause an employer to *discriminate* against an employee with respect to whom *membership in such organization has been denied or terminated* . . . ." (emphasis added).

[80] 93 CONG. REC. 6373 (1947).

foremen or to discharge foremen who were not union members.[81] He did not say whether he envisioned the type of activity involved in *Miranda,* activity having nothing to do with membership or non-membership in the union, as being an unfair labor practice.

3. *Section 8(b)(3)*

The possibility has been suggested that a union could violate section 8(b)(3) in failing to carry out its duty of fair representation.[82] Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively;[83] section 8(a)(5) likewise makes it an unfair labor practice on the part of an employer who fails to bargain collectively with the union.[84] The Act defines the requirement of collective bargaining in terms of "mutual obligations of the employer and the representative of the employees . . . in *good faith* with respect to wages, hours, and other terms and conditions of employment . . . ."[85] A reasonable conclusion would be that a union could not bargain in "good faith" if it took a position that was discriminatory toward individual members of the unit. An alternative to this proposition would be that "good faith" extends only to those "mutual obligations" arising between the employer and the union, and does not encompass any requirement of "good faith" between the union and the employee. In discussing the Act on the floor of the Senate, Senator Taft expressed his view that "the purpose of the bill is not to discipline labor leaders . . . . It is a bill intended to try to equalize the relations between the employer and employee."[86] With so little history relative to the question, the Board would not render Congress a great injustice by taking jurisdiction under section 8(b)(3).[87] Nevertheless, the framework of the Act, calling for mutual bargaining obligations between the employer and the union arising out of parallel sections, would be indicative that the duty of "good faith" in the bargaining process is required only in union-employer relationships, and not in union-employee relationships.

There is still no clear answer to the question whether Congress intended the Board to exert unfair labor practice jurisdiction over fair representation questions. There is certainly no allusion to *Steele* or even to the concept of unfair representation, although the concept was three years old at the time of the Taft-Hartley Act. It is probable that Congress

[81] *Id.*

[82] *See* Cox, *Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957).

[83] *See supra* note 46; National Labor Relations Act (Wagner Act) § 8(b)(3), 29 U.S.C. § 158(b)(3) (1964).

[84] National Labor Relations Act (Wagner Act) § 8(a)(5), 29 U.S.C. 158(a)(5) (1964).

[85] National Labor Relations Act (Wagner Act) § 8(d), 29 U.S.C. § 158(d) (1964).

[86] 93 CONG. REC. 4437 (1947).

[87] COX, *supra* note 82, at 172.

never considered the question since there is no definitive assertion that it intended the Board to exercise such authority; indeed, the history would allow an advocate of either position to extract isolated quotes from the Congressional Record and conclusively prove his point, while an equally skilled advocate could refute each item categorically. Nevertheless, it appears that Congress did not intend that the Board exercise unfair labor practice jurisdiction for two reasons. First, Congress made no mention of *Steele* or the concept of unfair representation. It could have easily done so. Only one allusion would have been dispositive that Congress intended the Board to assume jurisdiction. It would have been simple to empower the Board to assume jurisdiction with a mere word in the statute, or a quick allusion to *Steele*, but the absence of any indicia should be conclusive. Indeed, that Congress did not consider the possibility, is indicated by the Board's failure to assert jurisdiction for fifteen years. Second, the scheme of the unfair labor practice jurisdiction appears to be a balancing of reciprocal duties of union and management. Each statement indicating that Congress intended that unfair labor practices involve non-union related activities is balanced by a statement that the purpose of the Act is to achieve equality between unions and management, supported by specific examples that allude to activities involving rights related to joining or refusing to join in concerted activity. Senator Taft explained that he was not fond of administrative procedure in the field of labor relations, but he "believed that if we retain the unfair labor practice procedure against employers, an effort should be made to bring about some measure of equality by defining unfair labor practice[s] on the part of labor unions . . . ."[88] Taft then proceeded to point out that the Wagner Act had, for twelve years, made employer interference with the employee's right to self-organize an unfair labor practice, and "all that is attempted is to apply the same provision with exact equality to labor unions."[89]

Apologists for the Board's position can forcefully argue that even if Congress had not addressed itself specifically to the question of the Board's jurisdiction over unfair representation, it in no way indicated that it intended that the Board *not* exercise jurisdiction. Indeed, the rights of the employee to self-organize or refrain from engaging in concerted activity has little meaning if the union's unfair labor practice is restricted to those situations arising out of union-related activity. Since the exclusivity provision of section 9 means that *any* action taken by a union is binding upon the employee in the areas covered by the collective bargaining relationship, sections 8(b)(1), 8(b)(2) and 8(b)(3) would afford little protection to the individual employee if discriminatory

[88] 93 CONG. REC. 4436 (1947).

[89] *Id.* at 4437.

or coercive activities were only proscribed when they arose out of union-related activities. Congress could not have been so near-sighted as to assume that it could make the union the exclusive agent for collective bargaining, insure that employees would not be inhibited in their section 7 rights to self-determination whether to engage in concerted activities, and then restrict the protection only to those activities that related to the union acting in the area of union membership. The failure to allude to *Steele* could be considered unnecessary surplusage considering the nature of exclusive representation in the scheme of the Act. In either case, since 1962 the Board has assumed jurisdiction over unfair representation cases, in spite of (perhaps because of) the intent of Congress in 1947.

C. *Other Indicia That "Unfair Representation" Constitutes an Unfair Labor Practice*

1. *The Fifth and the D.C. Circuits*

Although the Board failed in its first attempt to have a violation of the duty of fair representation enforced by the Second Circuit, it was successful in convincing the Fifth Circuit that unfair representation was an unfair labor practice. In *Local 12, United Rubber Workers v. NLRB*,[90] Judge Thornberry found that unfair representation arising out of race could constitute a section 8(b)(1)A violation. Further, in a brief *per curiam* opinion in *NLRB v. Local 1367, International Longshoremen's Assoc.*,[91] the court relied on *Miranda* in finding that the duty to represent all of the union members impartially could constitute an unfair labor practice. Finally, in *Truck Drivers, Local 568 v. NLRB*[92] the D.C. Circuit recently concluded that the union's refusal to consolidate the seniority lists when two bargaining units merged could give rise to a section 8(b)(1)A violation, enforceable by the Board.

2. *The Board's Approach*

Since its *Miranda* decision, the Board has assumed unfair labor practice jurisdiction over the question of fair representation, despite the fact that the Second Circuit would not enforce *Miranda*, and to date, only the Fifth and the D.C. Circuits consider that unfair representation can give rise to an unfair labor practice violation. In the early 1960's, prior to *Miranda*, the Board took the position that section 8(b)(1) violations arose only in the context of force and violence.[93] In an administrative decision issued in 1960, the general counsel for the Board asserted that

[90] 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[91] 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[92] 379 F.2d 137 (D.C. Cir. 1967).

[93] Administrative Decision of the General Counsel, 1960 C.C.H. N.L.R.B. ¶ 9088; *see also* Textile Workers of America, 123 N.L.R.B. 590 (1959); Twin-Knee Mfg. Co., Inc., 130 N.L.R.B. 614 (1961).

" . . . in the absence of evidence of actual or threatened violence or reprisals by the union, insufficient basis existed for a finding that the union had engaged in any conduct violative of section 8(b)(1)A."[94] However, after *Miranda* the Board showed no evidence of retreating to its narrower reading of its unfair labor practice jurisdiction. The Board asserted "that with due deference to the circuit court's opinion, we adhere to our previous decision in *Miranda* until such time as the Supreme Court rules otherwise."[95] In *Sipes* the Supreme Court had the opportunity to settle the question, but pointedly declined to do so, merely assuming *arguendo* that such jurisdiction did exist for the purpose of deciding the merits of the case.[96]

III. The Remedy for Unfair Representation

In refusing to acknowledge the Board's challenge that it would treat unfair representation as being within its unfair labor practice jurisdiction until told otherwise, the Supreme Court in *Sipes* implicitly approved the Board's practice. The following factors should be noted in considering whether it is desirable for the Board to continue to exercise this jurisdiction:

Advantages (a) considerable expertise available when the Board adjudicates any problem involving the relationship of the union to its membership; (b) uniformity resulting from a consistent body of jurisprudential analysis when the Board, rather than the judiciary, has the authority to enforce a duty of fair representation; (c) theoretically at least, quicker adjudication in an administrative procedure geared solely for labor problems; (d) less expense and greater accessibility to members of the labor force; and (e) less formality and more opportunity for compromise.

Disadvantages (a) the potential of overloading the Board's already voluminous workload with unfair representation cases;[97] (b) the inability of the Board to assess *any* damages against the employer, who may be the initiator and ultimate wrongdoer; (c) the inability to affix a remedy other than an order directing the offending union to cease

[94] Administrative Decision of the General Counsel, 1960 C.C.H. N.L.R.B. ¶ 9088.

[95] Local 1367, Int'l. Longshoremen's Assc., 148 N.L.R.B. 897, 898 (1964).

[96] 386 U.S. at 180.

[97] Surprisingly perhaps, the Board's assumption of jurisdiction over unfair representation cases has caused no appreciable increase in the Board's caseload. In 1961, the year prior to *Miranda*, the Board reported handling 2181 violations of § 8(b)(1)A. National Labor Relations Board, Annual Report 220 (1961). In 1962 there were 2012 alleged violations. National Labor Relations Board, Annual Report 262 (1962). In 1963, the year after Miranda, the Board reported 2399 cases of alleged violations of § 8(b)(1)A. National Labor Relations Board, Annual Report 164 (1963). The latest Board report for fiscal year 1969 shows 3488 alleged § 8(b)(1)A violations. National Labor Relations Board, Annual Report 199 (1969). Section 8(b)(1)A violations accounted for 3488 of the total 18,651 unfair labor practice cases filed with the Board. National Labor Relations Board, Annual Report 1 (1969).

and desist from its unequal representation; and (d) the inability to join the employer, assessing him for his culpability, unless actual collusion exists between the union and the employer (in which case section 8(b)(2) would provide a remedy).

The opinion in *Sipes* pointed out many of the problems that may arise in providing an adequate remedy to the employee who has been unfairly represented by his union. The Court held that regardless of whether the Board or the judiciary had jurisdiction over an unfair representation controversy, the liability of the offending union was limited to the damage caused by the union's failure to adequately represent the employee's interest impartially and competently.[98] The amount of damages would be divisible between the union and the employer with "damages attributable solely to the employer's breach of contract . . . not . . . chargeable to the union, but increases if any in those damages caused by the union's refusal to process the grievance chargeable to the employer."[99] Thus, the main problem that arises when the Board assumes jurisdiction of unfair representation cases is the inability to provide complete and appropriate relief to the offended employee. If Congress had not intended that the Board should have jurisdiction, this problem would not arise since the judiciary has the ability to summon both the union and the employer before the bench and apportion the damages according to their respective degree of liability. For example, if the employer fired a member of the bargaining unit for good cause, even if the union were guilty of unfair representation in its refusal to process the grievance, the Board's remedy would nonetheless be incomplete since no damages could be assessed against the employer, the party ultimately responsible for the injury to the employee.[100]

A. *Examples of the Inadequacy of the Board's Remedial Power*

1. *Automative Plating Corp.*

Automative Plating Corp.[101] illustrates the ineffectiveness of the Board in handling unfair representation cases. In this case the union business manager felt that one of the union members was hostile toward the union's position on overtime work, and he vowed to "get rid of"[102] the dissident member. The employee had customarily performed extra work during his lunch break, but upon discovering that he had been underpaid, he refused to obey a direct order from his foreman to work during his lunch hour. He was immediately discharged for insubordination. The employee complained of his dismissal to the union, but the business

[98] 386 U.S. 198.

[99] *Id.*

[100] *Id.*

[101] 170 N.L.R.B. No. 121 (1968).

[102] *Id.*

manager who was out to "get rid of" him did not take up the dismissal with the company. The business manager informed the employee by letter that his "actions represented a clear case of insubordination,"[103] the reason for his discharge. The Board found that the employee's past record had been exceptional; thus, dismissal was a much more severe punishment than had been awarded to other employees under similar circumstances. Finding that neither the business manager nor any other union official above the shop level had done anything to achieve reinstatement, the Board found the union violative of section 8(b)(1).[104] On the basis of this finding, the Board ordered the union to "cease and desist from restraining or coercing any employee . . . by refusing to process grievances."[105] In addition, the Board ordered the union to consider the empolyee's grievance carefully, and, if necessary, to take the grievance to arbitration.[106] The Board was careful to retain jurisdiction over the case if its order proved ineffective.[107] The general counsel later concluded that the order was ineffective from the outset and asked that the case be reopened.[108] In exercising its retained jurisdiction, the Board noted that the union's failure to process the employee's grievance in the face of obvious employer misconduct was the underlying cause of the employee's injury. Thus, the Board ordered that the union pay back wages until it fulfilled its duty of fair representation or until the employee was able to obtain substantially equivalent employment.[109] The order requiring the union to pay back wages, assuming that the employer would ultimately be found responsible for the wrongful discharge, would seem to be violative of the principles of apportionment set out in *Sipes*. A dissenting member agreed with such an interpretation and suggested that the only allowable remedy would be for the injured employee to sue the employer under section 301 of the Taft-Hartley Act for violation of the employment contract, and to join the union in the action in order to recover the damages attributable to its unfair representation in regard to processing the grievance.[110] The dissent would have kept the Board from overstepping the bounds of *Sipes* in an attempt to provide the employee with an adequate remedy.[111]

Even if Congress intended that the Board should have jurisdiction to handle fair representation cases, the Board's remedy is inadequate. If

---

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Automotive Plating Corp., 183 N.L.R.B. No. 131 (1970).

[109] *Id.*

[110] *Id.*

[111] *Id.*

appellate approval is granted to the Board's order that the union be liable for the lost pay, the Board would be in a much stronger position to afford complete relief; however, such an order appears to violate *Sipes* in that it affixes liability against the union in excess of the union's proportionate share of the total liability.

2. *Port Drum Co.*

In *Port Drum Co.*[112] the union refused to arbitrate a discharged employee's grievance because the employee was not a member of the majority union, and the Board found an unfair labor practice under section 8(b)(1)A. The Board ordered the union (1) to carry the employee's grievance to arbitration, and (2) to cease and desist discriminatory actions on the basis of an employee's non-membership in the union.[113] As in *Automative Plating*, the Board retained jurisdiction to ensure that the order effectuated a remedy. The cease and desist order was ineffective to insure the employee an adequate remedy, as he died before the grievance was taken to arbitration. The Board therefore ordered the union to pay the employee's estate for the lost pay accruing during the period of discharge.[114] In this attempt to effectuate a full and adequate remedy the Board ordered the union to make up back pay even though the employer must ultimately bear responsibility for the wrongful discharge. However, *Port Drum Co.* does much less offense to the apportionment principle of *Sipes*. The Supreme Court had specifically authorized the assessment of damages against a union to the extent of "those damages caused by the union's refusal to process the grievance . . . ."[115] Here, damages arose out of the union's failure to process the grievance; the death of the grievant foreclosed any opportunity on the part of the union to rectify its earlier refusal. This appears to be a case in which the union could be independently liable for damages arising out of a breach of fair representation. While the union could not be responsible for the employer's wrongful discharge, union liability predicated in terms of lost pay appears to be a reasonable method of calculating the union's contribution to the employee's injury.

IV. CONCLUSION

Steele laid the predicate for the proposition that inherent in the statutory power as the exclusive bargaining agent exists a corresponding duty of fair representation on the part of the union. The judiciary has the power to enforce this duty. The Board *does* enforce it with the tacit

---

[112] 170 N.L.R.B. No. 51 (1968).

[113] *Id.*

[114] Port Drum Co., 180 N.L.R.B. No. 90 (1970).

[115] 386 U.S. at 198.

approval of Congress, which has not amended the Act to exclude specifically this jurisdiction, and the consent of the judiciary, with the Supreme Court pointedly refusing to oust the Board from its self-asserted jurisdiction. Since the Second and Fifth Circuits disagree as to the Board's jurisdiction, and since the D.C. Circuit has granted enforcement of unfair representation questions, perhaps the Supreme Court will be forced to decide in order to avoid blatant forum shopping for enforcement of an order of the Board. For example, if an unfair representation question were to arise in a case appealable to the Second Circuit, the interested parties would know beforehand that the order would be unenforceable, but that the D.C. Circuit would find enforcement jurisdiction. Thus, the party who first files his appeal in the appropriately chosen court would be assured of the outcome.

Whatever Congress intended, if it had any definable intent, the Board has asserted jurisdiction over fair representation cases, but in doing so has shown a marked inability to effectuate a complete remedy. Perhaps the question whether the Board should have jurisdiction over such cases should be a legislative rather than a judicial determination. This could explain the hesitance on the part of the Court to give binding guidance. Considering that the Board is a creature of Congress, that its operating funds are provided from that source, and that the extent of its powers is statutorily prescribed, it is logical that Congress, rather than the judiciary, should resolve the existence and extent of the Board's sojourn into this area. For better or worse, with or without Congressional approval, with only tacit judicial approval (and, at least insofar as the Second Circuit is concerned, explicit disapproval), and patently without the power to effectuate an adequate remedy, the Board continues to believe that it has been appointed as the arbiter over unfair representation cases.